

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

<p>UNITED STATES OF AMERICA, Plaintiff, vs. ORLANDO DONES-VARGAS, a/k/a "Landy," Defendant.</p>	<p>4:17-CR-40086-01-KES FINAL INSTRUCTIONS TO THE JURY</p>
---	---

TABLE OF CONTENTS

FINAL INSTRUCTIONS

FINAL INSTRUCTION NO. 1 – INTRODUCTION 1
FINAL INSTRUCTION NO. 2 – CONSPIRACY TO DISTRIBUTE METHAMPHETAMINE.. 2
FINAL INSTRUCTION NO. 3 – POSSESSION WITH INTENT TO DISTRIBUTE
METHAMPHETAMINE 6
FINAL INSTRUCTION NO. 4 – IMPEACHMENT 9
FINAL INSTRUCTION NO. 5 – PRESUMPTION OF INNOCENCE AND BURDEN OF
PROOF 12
FINAL INSTRUCTION NO. 6 – REASONABLE DOUBT 13
FINAL INSTRUCTION NO. 7 – DUTY TO DELIBERATE 14
FINAL INSTRUCTION NO. 8 – DUTY DURING DELIBERATIONS 15

FINAL INSTRUCTION NO. 1 – INTRODUCTION

Members of the jury, the written instructions I gave you at the beginning of the trial and the oral instructions I gave you during the trial remain in effect. I now give you some additional instructions.

The instructions I am about to give you, as well as the preliminary instructions given to you at the beginning of the trial, are in writing and will be available to you in the jury room. *All* instructions, whenever given and whether in writing or not, must be followed. This is true even though some of the instructions I gave you at the beginning of the trial are not repeated here.

**FINAL INSTRUCTION NO. 2 – CONSPIRACY TO DISTRIBUTE
METHAMPHETAMINE**

For you to find Orlando Dones-Vargas guilty of the “conspiracy” offense charged in Count 1 of the Superseding Indictment, the prosecution must prove the following essential elements beyond a reasonable doubt:

One, that beginning on an unknown date and continuing until on or about August 20, 2017, two or more persons reached an agreement or came to an understanding to distribute a mixture or substance containing methamphetamine;

A conspiracy is an agreement of two or more persons to commit one or more crimes. It makes no difference whether any co-conspirators are defendants or named in the Superseding Indictment. For this element to be proved,

- Dones-Vargas may have been, but did not have to be, one of the original conspirators
- The crime that the conspirators agreed to commit did not actually have to be committed
- The agreement did not have to be written or formal
- The agreement did not have to involve every detail of the conspiracy
- The conspirators did not have to personally benefit from the conspiracy

Here, the conspirators allegedly agreed to commit the crime of distribution of a mixture or substance containing methamphetamine. The elements of distribution of a mixture or substance containing methamphetamine are the following:

- *One*, that a person intentionally transferred a mixture or substance containing methamphetamine to another;
- *And two*, that at the time of the transfer, the person knew that what he was transferring was a controlled substance.

Remember that the prosecution does not have to prove that distribution of a mixture or substance containing

methamphetamine actually occurred for this element of the “conspiracy” offense to be proved.

Two, that the defendant voluntarily and intentionally joined in the agreement or understanding, either at the time it was first reached or at some later time while it was still in effect;

Dones-Vargas must have joined in the agreement, but he may have done so at any time during its existence. Dones-Vargas may have joined the agreement even if he agreed to play only a minor role in it.

Dones-Vargas did not have to do any of the following to join the agreement:

- join the agreement at the same time as all the other conspirators
- know all of the details of the conspiracy, such as the names, identities, or locations of all the other members, or
- conspire with every other member of the conspiracy

On the other hand, each of the following, alone, is not enough to show that Dones-Vargas joined the agreement:

- evidence that a person was merely present at the scene of an event
- evidence that a person merely acted in the same way as others
- evidence that a person merely associated with others
- evidence that a person was friends with or met socially with individuals involved in the conspiracy
- evidence that a person who had no knowledge of a conspiracy acted in a way that advanced an objective of the conspiracy
- evidence that a person merely knew of the existence of a conspiracy
- evidence that a person merely knew that an objective of the conspiracy was being considered or attempted, or

- evidence that a person merely approved of the objectives of the conspiracy.

Rather, the prosecution must prove that Dones-Vargas had some degree of knowing involvement in the conspiracy.

In deciding whether an alleged conspiracy existed, you may consider the acts and statements of each person alleged to be part of the agreement. In deciding whether the defendant joined the agreement, you may consider only the acts and statements of the defendant.

And three, that at the time the defendant joined in the agreement or understanding, he knew the purpose of the agreement or understanding.

A person knows the purpose of the agreement if he is aware of the agreement and does not participate in it through ignorance, mistake, carelessness, negligence, or accident. It is seldom, if ever, possible to determine directly what was in the defendant's mind. Thus the defendant's knowledge of the agreement and its purpose can be proved like anything else, from reasonable conclusions drawn from the evidence.

It is not enough that the defendant and other alleged participants in the agreement to commit the crime of distribution of methamphetamine simply met, discussed matters of common interest, acted in similar ways, or perhaps helped one another. The defendant must have known of the existence and purpose of the agreement. Without such knowledge, the defendant cannot be guilty of conspiracy, even if his acts furthered the conspiracy.

For you to find the defendant guilty, the prosecution must prove all of the essential elements of this offense beyond a reasonable doubt. Otherwise, you must find the defendant not guilty of the offense charged in Count 1 of the Superseding Indictment.

Quantity of Methamphetamine

If you find Dones-Vargas guilty of the "conspiracy" offense alleged in Count 1 of the Superseding Indictment, you must also determine beyond a

reasonable doubt the quantity of methamphetamine involved in the conspiracy for which Dones-Vargas can be held responsible. The prosecution does not have to prove that the offense involved the amount or quantity of methamphetamine charged in the Superseding Indictment, although the prosecution must prove beyond a reasonable doubt the quantity of methamphetamine actually involved in the offense for which the defendant can be held responsible. Therefore, you must ascertain whether or not the controlled substance in question was in fact methamphetamine, as charged in the Superseding Indictment, and you must determine beyond a reasonable doubt the amount of methamphetamine involved in the offense for which the defendant can be held responsible. In so doing, you may consider all of the evidence in the case that may aid in the determination of these issues.

A defendant guilty of conspiracy to distribute methamphetamine, as charged in the Superseding Indictment, is responsible for quantities of methamphetamine that he actually distributed or agreed to distribute. Such a defendant is also responsible for those quantities of methamphetamine that fellow conspirators distributed or agreed to distribute, if you find that the defendant could have reasonably foreseen, at the time he joined the conspiracy or while the conspiracy lasted, that those prohibited acts were a necessary or natural consequence of the conspiracy.

You must determine the *total quantity* of the controlled substance involved in the conspiracy for which the defendant can be held responsible. You must indicate the *range* within which that *total quantity* falls. You must determine that *total quantity* in terms of grams of a mixture or substance containing a detectable amount of methamphetamine. In making your determination of quantity as required, it may be helpful to remember that one pound is equal to 453.6 grams, that one ounce is equal to 28.35 grams, and that one kilogram is equal to 1000 grams.

Again, you must determine *beyond a reasonable doubt* the quantity of methamphetamine involved in the conspiracy for which the defendant can be held responsible.

FINAL INSTRUCTION NO. 3 – POSSESSION WITH INTENT TO DISTRIBUTE METHAMPHETAMINE

For you to find Orlando Dones-Vargas guilty of possession with the intent to distribute methamphetamine, as charged in Count 2 of the Superseding Indictment, the prosecution must prove the following essential elements beyond a reasonable doubt:

One, that on or about August 20, 2017, Dones-Vargas was in possession of methamphetamine;

Two, that Dones-Vargas knew that he was in possession of methamphetamine;

The law recognizes several kinds of possession. A person may have actual possession or constructive possession. A person may have sole or joint possession.

A person who knowingly has direct physical control over a thing, at a given time, is then in actual possession of it.

A person who, although not in actual possession, has both the power and the intention at a given time to exercise dominion or control over a thing, either directly or through another person or persons, is then in constructive possession of it.

If one person alone has actual or constructive possession of a thing, possession is sole. If two or more persons share actual or constructive possession of a thing, possession is joint.

Whenever the word “possession” has been used in these instructions it includes actual as well as constructive possession and also sole as well as joint possession.

And three, that Dones-Vargas intended to distribute some or all of the methamphetamine to another person.

The term “distribute” means to deliver a controlled substance to the actual or constructive possession of another person. It is not necessary that money or anything of value change hands. The law prohibits the “possession with intent to distribute” a controlled substance; the prosecution does not have to prove that there was, or was intended to be, a “sale” of a controlled substance to prove “possession with intent to distribute.”

It is not necessary for the government to prove that Dones-Vargas knew the precise nature of the controlled substance that he possessed with the intent to distribute.

The government must prove beyond a reasonable doubt, however, that Dones-Vargas did know that some type of controlled substance was possessed with intent to distribute.

In attempting to determine the intent of any person, you may take into your consideration all the facts and circumstances shown by the evidence received in the case concerning that person. If you find beyond a reasonable doubt that the defendant possessed a large quantity of methamphetamine, that is evidence from which you may, but are not required to, find or infer that the defendant intended to distribute methamphetamine.

In determining a person's "intent to distribute" a controlled substance, you may consider, among other things, the purity of the controlled substance, the quantity of the controlled substance, the presence of equipment used in the processing or sale of controlled substances, and large amounts of cash or weapons.

If all of these elements have been proved beyond a reasonable doubt as to Dones-Vargas, then you must find Dones-Vargas guilty of the crime charged in Count 2 of the Superseding Indictment; otherwise, you must find Dones-Vargas not guilty of that crime.

Quantity of Methamphetamine

If you find Dones-Vargas guilty of possession with intent to distribute methamphetamine, as charged in Count 2 of the Superseding Indictment, you must also determine beyond a reasonable doubt the quantity of methamphetamine for which the defendant can be held responsible. The government must prove beyond a reasonable doubt the quantity of methamphetamine actually involved in the offense for which Dones-Vargas can be held responsible. Therefore, you must ascertain whether or not the controlled substance in question was in fact methamphetamine, as charged in Count 2 of the Superseding Indictment, and you must determine beyond a reasonable doubt the amount of methamphetamine involved in the offense for

which Dones-Vargas can be held responsible. In so doing, you may consider all of the evidence in the case that may aid in the determination of these issues.

You must determine the *total quantity* of the controlled substance involved in the offense in which the defendant can be held responsible. You must indicate the *range* within which that *total quantity* falls. You must determine that *total quantity* in terms of grams of methamphetamine. In making your determination of quantity as required, it may be helpful to remember that one ounce is equal to 28.35 grams.

Again, you must determine *beyond a reasonable doubt* the quantity of methamphetamine involved in the offense in which the defendant can be held responsible.

FINAL INSTRUCTION NO. 4 – IMPEACHMENT

In Preliminary Instruction No. 6, I instructed you generally on the credibility of witnesses. I now give you this further instruction on how the credibility of a witness can be “impeached” and how you may treat certain evidence.

A witness may be discredited or impeached by contradictory evidence; by a showing that the witness testified falsely concerning a material matter; or by evidence that at some other time the witness has said or done something, or has failed to say or do something, that is inconsistent with the witness’s present testimony. If earlier statements of a witness were admitted into evidence, they were not admitted to prove that the contents of those statements were true. Instead, you may consider those earlier statements only to determine whether you think they are consistent or inconsistent with the trial testimony of the witness, and therefore whether they affect the credibility of that witness.

You have heard evidence that witnesses Margaret Ghost, Jose Riveraperez, Blanca Luna-Soto, and Edras Chua-Lemus have each been convicted of a crime. You may use that evidence only to help you decide whether or not to believe that witness and how much weight to give his/her testimony.

Similarly, you have heard evidence that Blanca Luna-Soto and Edras Chua-Lemus have pleaded guilty to charges that arose out of the same events for which this defendant is now on trial. You cannot consider such a witness’s guilty plea as any evidence of the guilt of this defendant. Rather, you can consider such a witness’s guilty plea only for the purpose of determining how much, if at all, to rely upon his/her testimony.

You should treat the testimony of certain witnesses with greater caution and care than that of other witnesses:

1. You have heard testimony from Margaret Ghost, Jose Riveraperez, Blanca Luna-Soto, and Edras Chua-Lemus that they participated in the crime charged against this defendant. Their testimony was received in evidence and you may consider it. You may give the testimony of such a witness such weight as you think it deserves. Whether or not the testimony of such a witness may have been influenced by their desire to please the government or to strike a good bargain with the government about their own situation is for you to determine.
2. You have heard evidence that Margaret Ghost and Jose Riveraperez have received a promise from the government that they will not be prosecuted and have received a promise from the government that their testimony will not be used against them in a criminal case. Their testimony was received in evidence and may be considered by you. You may give their testimony such weight as you think it deserves. Whether or not their testimony may have been influenced by the government's promises is for you to determine.
3. You have heard evidence that witnesses Blanca Luna-Soto and Edras Chua-Lemus have made a plea agreement with the government. The testimony of the witnesses was received in evidence and may be considered by you. You may give this testimony such weight as you think it deserves. Whether or not this testimony may have been influenced by receiving the plea agreement is for you to determine.
4. You have heard evidence that Blanca Luna-Soto and Edras Chua-Lemus may receive a reduced sentence on criminal charges pending against them in return for their cooperation with the government in this case. The witnesses entered into an agreement with the government which provides that, in return for their assistance, the government will recommend a less severe sentence for the crime or crimes with which they are charged. Blanca Luna-Soto and Edras Chua-Lemus are subject

to a mandatory minimum sentence, that is, a sentence that the law provides must be of a certain minimum length. If the prosecutor handling their case believes they provided substantial assistance, that prosecutor can file in the court in which the charges are pending against them a motion to reduce their sentence below the statutory minimum. The judge has no power to reduce a sentence for substantial assistance unless the government, acting through the United States Attorney, files such a motion. If a motion for reduction of sentence for substantial assistance is filed by the government, then it is up to the judge to decide whether to reduce the sentence at all, and if so, how much to reduce it.

If you believe that a witness has been discredited or impeached, it is your exclusive right to give that witness's testimony whatever weight you think it deserves.

**FINAL INSTRUCTION NO. 5 – PRESUMPTION OF INNOCENCE AND
BURDEN OF PROOF**

The presumption of innocence means that the defendant is presumed to be absolutely not guilty.

- This presumption means that you must put aside all suspicion that might arise from the defendant's arrest, the charges, or the fact that he is here in court.
- This presumption remains with the defendant throughout the trial.
- This presumption is enough, alone, for you to find the defendant not guilty, unless the prosecution proves, beyond a reasonable doubt, all of the elements of an offense charged against him.

The burden is always on the prosecution to prove guilt beyond a reasonable doubt.

- This burden never, ever shifts to the defendant to prove his innocence.
- This burden means that the defendant does not have to call any witnesses, produce any evidence, cross-examine the prosecution's witnesses, or testify.
- This burden means that, if the defendant does not testify, you must not consider that fact in any way, or even discuss it, in arriving at your verdict.
- This burden means that you must find the defendant not guilty of the offenses charged against him, unless the prosecution proves beyond a reasonable doubt that he has committed each and every element of the offenses.

FINAL INSTRUCTION NO. 6 – REASONABLE DOUBT

A reasonable doubt is a doubt based upon reason and common sense.

- A reasonable doubt may arise from evidence produced by the prosecution or the defendant, keeping in mind that the defendant never, ever has the burden or duty to call any witnesses or to produce any evidence.
- A reasonable doubt may arise from the prosecution's lack of evidence.

The prosecution must prove the defendant's guilt beyond a reasonable doubt.

- Proof beyond a reasonable doubt requires careful and impartial consideration of all the evidence in the case before making a decision.
- Proof beyond a reasonable doubt is proof so convincing that you would be willing to rely and act on it in the most important of your own affairs.

The prosecution's burden is heavy, but it does not require proof beyond all possible doubt.

FINAL INSTRUCTION NO. 7 – DUTY TO DELIBERATE

A verdict must represent the careful and impartial judgment of each of you. Before you make that judgment, you must consult with one another and try to reach agreement if you can do so consistent with your individual judgment.

- If you are convinced that the prosecution has not proved beyond a reasonable doubt that the defendant is guilty, say so.
- If you are convinced that the prosecution has proved beyond a reasonable doubt that the defendant is guilty, say so.
- Do not give up your honest beliefs just because others think differently or because you simply want to be finished with the case.
- On the other hand, do not hesitate to re-examine your own views and to change your opinion if you are convinced that it is wrong.
- You can only reach a unanimous verdict if you discuss your views openly and frankly, with proper regard for the opinions of others, and with a willingness to re-examine your own views.
- Remember that you are not advocates, but judges of the facts, so your sole interest is to seek the truth from the evidence.
- The question is never who wins or loses the case, because society always wins, whatever your verdict, when you return a just verdict based solely on the evidence, reason, your common sense, and these Instructions.
- You must consider all of the evidence bearing on each element before you.
- Take all the time that you feel is necessary.
- Remember that this case is important to the parties and to the fair administration of justice, so do not be in a hurry to reach a verdict just to be finished with the case.

FINAL INSTRUCTION NO. 8 – DUTY DURING DELIBERATIONS

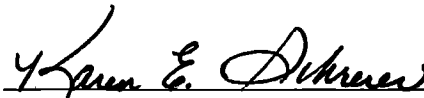
You must follow certain rules while conducting your deliberations and returning your verdict:

- Select a foreperson to preside over your discussions and to speak for you here in court.
- Do not consider punishment in any way in deciding whether the defendant is guilty or not guilty. If the defendant is guilty, I will decide what the sentence should be.
- Communicate with me by sending me a note through a Court Security Officer (CSO). The note must be signed by one or more of you. Remember that you should not tell anyone, including me, how your votes stand. I will respond as soon as possible, either in writing or orally in open court.
- Base your verdict solely on the evidence, reason, your common sense, and these Instructions. Again, nothing I have said or done was intended to suggest what your verdict should be—that is entirely for you to decide.
- Reach your verdict without discrimination. In reaching your verdict, you must not consider the defendant's race, color, religious beliefs, national origin, or sex. You are not to return a verdict for or against the defendant unless you would return the same verdict without regard to his race, color, religious beliefs, national origin, or sex.
- Complete the Verdict Form. The foreperson must bring the signed verdict form to the courtroom when it is time to announce your verdict.
- When you have reached a verdict, the foreperson will advise the CSO that you are ready to return to the courtroom.

Good luck with your deliberations.

DATED January 30, 2018.

BY THE COURT:

Handwritten signature of Karen E. Schreier in cursive script.

KAREN E. SCHREIER

UNITED STATES DISTRICT JUDGE